No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1944

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (R. 28–36) is reported at 1 T. C. 1036. The opinion of the Circuit Court of Appeals (R. 71–78) is reported at 141 F. 2d 419.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1944 (R. 78). The petition for a writ of certiorari was filed May 19, 1944. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1937 the taxpayer and her husband, whose estate she represents as executrix, each made gifts worth $5,975 to each of seven trusts which they had previously established in favor of seven minor grandchildren. Each trust instrument provided that the income and corpus were to be distributed in portions as the beneficiary reached the ages of 25, 30, and 35 years, and also that, if necessary, the trustee was to provide for the support, maintenance, and education of the grandchild, using only the income of the trust if that were sufficient. The question is whether the gifts were of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, so as to negative a $5,000 exclusion from each gift, to which the donors would otherwise be entitled.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 504. NET GIFTS.
>
> (a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.
>
> (b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included

in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 Ed.):

> ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The taxpayer, on her own behalf and also as executrix of her husband's estate, petitioned the Tax Court to redetermine deficiencies found by the Commissioner in the gift taxes of the taxpayer and her husband for 1937. The facts were stipulated (R. 42–64), and as stipulated were adopted as the findings of fact of the Tax Court (R. 29). They may be summarized as follows:

During 1935, 1936, and 1937 the taxpayer and her husband executed seven trust instruments, one in favor of each of their seven grandchildren (R. 30). On or about December 2, 1937, the taxpayer and her husband each made a gift to each trust of 100 shares of Humble Oil & Refining Company stock having a fair market value at that time of $59.75 a share (R. 33). On their gift tax returns

for 1937 the taxpayer and her husband each claimed the statutory exclusion of $5,000 for each of his seven gifts, reported a taxable gift to each trust of $975, and paid gift taxes on the basis reported (R. 33). The Commissioner determined that the gifts in trust constituted gifts of future interests in property against which no exclusions are allowable, and he accordingly disallowed the exclusions (R. 34).

None of the grandchildren was over six years of age at the time the trust was created for him. All were living when this proceeding was heard. Each trust instrument made W. W. Fondren trustee. Upon his death in 1939, the taxpayer succeeded to the trusteeship and has since administered each trust as trustee. (R. 30.)

So far as here pertinent, the provisions of the seven trust instruments were the same (R. 30). The trusts were absolute and irrevocable and the grantors neither received nor retained any interest in the estate or the benefits accruing therefrom (R. 33).

The stated purpose in creating each trust was "to provide for the personal comfort, support, maintenance and welfare of" each grandchild. The trusts were to continue until each grandchild attained the age of 35, but 25 percent of the corpus and accumulations, if any, were to be delivered to the grandchild when he or she attained the age of 25, 33⅓ percent when he or she attained age 30, and the remainder when

he or she attained age 35. If the beneficiary died leaving issue before termination of the trust, the trust estate was to be held and administered for the benefit of the issue and delivered share and share alike when the youngest of such issue attained age 21. If the beneficiary died without issue before termination of the trust, successor beneficiaries were provided for by the trust instruments, or the trust estate descended to the heirs under the laws of the State of Texas (R. 32).

Article Three of the trust instrument provided (R. 31-32):

> Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, by either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson [or Granddaughter as the case may be] using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.
>
> It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby

> created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.
>
> * * * * *

The trust funds were not to be liable for obligations of the beneficiaries. A beneficiary could not anticipate his or her interest in the trust fund created for him and the fund could not be reached by judgment creditors or others having claims against the beneficiary. (R. 32–33.)

At all times subsequent to the creation of the trusts, the parents of the named beneficiaries have adequately and sufficiently provided for the support, maintenance, and education of their chil-

dren. As a result, no part of the trust income or corpus has been distributed or used for the benefit, support, maintenance, or education of any of the beneficiaries of the seven trusts. (R. 34.)

The Tax Court found that the gifts made by the taxpayer and her husband to the trust estates were gifts of future interests (R. 34) and sustained the Commissioner's determinations of deficiency. The Circuit Court of Appeals affirmed the Tax Court's decision (R. 78).

ARGUMENT

Since the decisions in *United States* v. *Pelzer*, 312 U. S. 399, 403–404, and *Ryerson* v. *United States*, 312 U. S. 405, which specifically approved the definition of "future interests" in Treasury Regulations 79, Article 11, *supra*, gifts of property have uniformly been held to be gifts of future interests if their use, possession, or enjoyment is postponed either to a fixed future time or to a future time to be determined in the discretion of a trustee or upon some other contingency. The time of vesting of legal or equitable title is immaterial. *Howe* v. *United States* (C. C. A. 7th), decided April 25, 1944 (1944 P-H, par. 62,533); *Sensenbrenner* v. *Commissioner*, 134 F. 2d 883 (C. C. A. 7th); *Commissioner* v. *Lowden*, 131 F. 2d 127 (C. C. A. 7th); *Commissioner* v. *Gardner*, 127 F. 2d 929 (C. C. A. 7th); *Commissioner* v. *Glos*, 123 F. 2d 548 (C. C. A. 7th); *Fisher* v. *Commissioner*, 132 F. 2d 383 (C. C. A. 9th);

French v. *Commissioner*, 138 F. 2d 254 (C. C. A. 8th); *Commissioner* v. *Wells*, 132 F. 2d 405 (C. C. A. 6th); *Commissioner* v. *Phillips' Estate*, 126 F. 2d 851 (C. C. A. 5th); *Hopkins* v. *Magruder*, 122 F. 2d 693 (C. C. A. 4th); *Commissioner* v. *Taylor*, 122 F. 2d 714 (C. C. A. 3d), certiorari denied, 314 U. S. 699; *Helvering* v. *Blair*, 121 F. 2d 945 (C. C. A. 2d); *Welch* v. *Paine*, 130 F. 2d 990 (C. C. A. 1st); *Commissioner* v. *Brandegee*, 123 F. 2d 58 (C. C. A. 1st); *Welch* v. *Paine*, 120 F. 2d 141 (C. C. A. 1st).

The decision below is not in conflict with the decisions in *Smith* v. *Commissioner*, 131 F. 2d 254 (C. C. A. 8th); *Sensenbrenner* v. *Commissioner*, *supra*; and *Kinney* v. *Anglim*, 43 F. Supp. 431 (N. D. Calif.), as the taxpayer asserts it to be (Br. 6). In the *Sensenbrenner* case the gift of the corpus was held to be that of a future interest, in accordance with the Government's contention. Since the entire income was to be distributed to the beneficiaries quarterly or oftener and the trustee had no discretion to accumulate the income, a present interest in the income was, however, conferred. In *Kinney* v. *Anglim* the gift was held to be of a present interest because the income was to be paid over currently. In the *Smith* case the court found from the trust instrument, the size of the gift, the ages of the beneficiaries and the purpose of the trust that the grantor did not intend an accumulation or retention of principal or income, but affirmatively

intended both principal and income to be paid over currently for the education of the beneficiaries and to prepare them to attain and occupy an advantageous and desirable position in life. The beneficiaries needed the money for these purposes immediately, and this was understood by the grantor when the gifts were made. The trustee had no real discretion to withhold the income or the corpus. The court in the *Smith* case expressly rested its decision upon the peculiar facts and distinguished cases like the present where the real trust purpose is to accumulate income even though the trustee is empowered to pay over some of the income or corpus during the accumulating period if the beneficiaries should fall into need. That the *Smith* and *Sensenbrenner* cases are not inconsistent with the principle generally followed is indicated by the fact that other decisions in the same circuits, in cases in which the trustees had discretion to accumulate income or to distribute it, hold that future interests were involved (*Commissioner* v. *Gardner, supra; French* v. *Commissioner, supra,* expressly distinguishing *Smith* v. *Commissioneer, supra*).

The properties given in trust in the instant case are well within the definition of future interests for gift-tax purposes as it has thus been settled. In Article Three the grantors stated their expectation that the grandchildren would have other and adequate means of support, and expressed the hope that all of the earnings and income of the

trust estates might be retained and accumulated for delivery intact when the donees reached the specified ages. The trustees are directed to pay over the income or corpus for the grandchildren's support, maintenance, and education only if that should be necessary. Article Three expressly contemplates that this contingency, if it should occur at all, will happen only at a future time. That the trustees may under some circumstances fall under a duty to apply trust income or corpus to education and support does not alter the contingent and future nature of the beneficiaries' interest for gift-tax purposes. *French* v. *Commissioner, supra.* Especially is this the case where, as here, the beneficiaries are of tender age at the time of the gifts.

CONCLUSION

There is no conflict of decisions. The instant case turns upon its own facts and was correctly decided below. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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